In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-137

TONY RICE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

By the Northern Pacific Act of July 2, 1864, 13 Stat. 365, 367, Congress granted to the Northern Pacific Railway a right-of-way 400 feet wide from Lake Superior to Puget Sound. After this right-of-way had been surveyed (and the land thus removed from the public domain) and the Railway, which is still in operation, had been built, the United States granted to petitioners' ancestor in title a 160-acre homestead patent to land through which the right-of-way runs, without mentioning the right-of-way. See *Rice* v. *United States,* 348 F. Supp. 254, 255. Petitioners argue that because of the government's error they are entitled to the minerals underlying the right-of-way.

In opinions on which we rely, the courts below affirmed the administrative decision of the Secretary of the Interior that the petitioners have no title to any part of the land withdrawn for the right-of-way, whether surface rights or rights to sub-surface minerals.

As the courts below held, once the right-of-way had been granted, the entirety of that land was withdrawn from the public domain. Whether or not the minerals under the right-of-way were conveyed to the railway, petitioners cannot benefit from the failure of the government to except the land on which the right-of-way was granted from the homestead grant to petitioners' ancestor in title. This Court has repeatedly held that once a tract of public land has been appropriated for a public purpose, it is severed from the mass of the public domain and is thereafter not subject to entry under another law providing for private acquisition of the public domain. *Northern Pacific Ry.* v. *Townsend,* 190 U.S. 267, 270; *Hastings Etc. Railroad Co.* v. *Whitney,* 132 U.S. 357; *Wilcox* v. *Jackson,* 13 Pet. 498; *Witherspoon* v. *Duncan,* 4 Wall. 210; *Carroll* v. *Safford,* 3 How. 441; *United States* v. *Union Pacific Railroad Company,* 353 U.S. 112; and *Wyoming* v. *Udall,* 379 F. 2d 635 (C.A. 10), certiorari denied, 389 U.S. 985. The fact that, years after the grant to petitioners' ancestor, it was determined that the government and not the railway would have the mineral rights under the right-of-way (see *United States* v. *Union Pacific Railroad Co., supra*), does not imply that those rights would inure to petitioners.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.